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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY M. KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of a 31-count indictment charging him and others with making false statements to the Social Security Administration in connection with the administration of the Health Insurance for the Aged ("Medicare") Act (42 U.S.C. 1395 *et seq.*), in violation of 18 U.S.C. 1001 (Counts Six and Thirty) and 42 U.S.C. 408(c)

(Counts Two, Thirteen, and Sixteen).[1] On June 29, 1971, he was sentenced to two years' imprisonment on each of the two counts charging violations of 18 U.S.C. 1001 and to one year on each of the other counts, all five terms to run concurrently, and in addition was fined $1,000 on each count. The court of appeals affirmed (Pet. App. A1-A6).

1. Petitioner, a physician, was Chief of Staff of Pinellas General Hospital, in Largo, Florida, and president of the corporation which owned the hospital. Each of the five counts in question charged that he billed the Social Security Administration for more hospital visits to a named Medicare patient than he had made. The number of visits claimed in the billings to have been made ranged from nine (each of two patients) to 40 and totaled 86 for all five patients (Pet. App. A3). It is undisputed that it was petitioner's uniform practice to bill the government for one visit per patient (at $10 or $15 per visit) for each day the patient was hospitalized and that the pertinent billings conformed with this schedule (Pet. App. A3; Tr. 995, 2496).[2] The government's evidence—including testimony by some of the patients, testimony by relatives of others, and the

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[1] Of the remaining 26 counts, 19 did not involve petitioner; three were dismissed prior to trial on the government's motion; judgments of acquittal were granted as to two; and petitioner was acquitted by the jury as to two (including a conspiracy count).

[2] "Tr." refers to the trial transcript, in 16 consecutively paginated volumes, a copy of which is being lodged herewith.

"nurses' notes" relating to the patients[3]—indicated that the great majority of the visits claimed to have been made were not made. For example, Ruby Clarke, the patient involved in Count Six, testified that she had seen petitioner only once or twice during her two-and-a-half-week stay at the hospital and that on the occasion or occasions in question he had merely entered the room, said "Hello, Ruby. How are you?", and departed without examining her or even waiting for her to answer (Tr. 2214-2215, 2356-106[4]). The nurses' notes reflect one visit by petitioner to this patient (G. Ex. 406; Tr. 3365). Petitioner's bill was for 18 visits (G. Ex. 240; Tr. 3365). Mabel Ragan, the patient named in Count Thirty of the indictment, could recall seeing petitioner only once during her nine-day confinement and on that occasion he did not examine her (Tr. 468-469, 2356-108). The nurses' notes reflect two visits (G. Ex. 430; Tr. 2980-2982). Petitioner billed for nine vis-

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[3] The "nurses' notes" were the rough logs contemporaneously kept by the attending nurses of their day-to-day ministrations to patients. It was the practice to record visits by the attending physicians in the notes, though "occasionally" such visits—as when the nurse would be too busy with her other duties to note them—would go unrecorded. As explained by a nurse-witness: "Let's say we try to [record visits by the attending physician in the notes]. Nurses try to. We don't always get the entries made. Sometimes we are too busy. They go without being charted occasionally" (Tr. 690).

[4] The reference "2356-106" (see also similar references *infra*) is to a single page of the transcript. (Due to a pagination error, the 220 pages following page 2356 are numbered "2356-1" to "2356-220.")

its (G. Ex. 258; Tr. 455, 3367). Farris Cox (Count Thirteen) testified that he had never to his knowledge been visited by petitioner in his hospital room during his nine-day stay, though he recalled seeing petitioner pass by in the corridor once and remembered being given an inoculation by him in his office on the occasion of his discharge. If petitioner did visit him, Cox said, it must have been while he was sleeping (Tr. 1581-1582, 2356-107). The nurses' notes show three visits (G. Ex. 413; Tr. 3366). Petitioner charged the government for nine (G. Ex. 277; Tr. 2356-107, 3361).

With respect to Nooner Campbell, the patient named in Count Two, who died prior to trial, the nurses' notes reflect four visits by petitioner during a 40-day hospitalization (G. Ex. 412; Tr. 1527, 2356-106, 3358, 3363-3364). Petitioner billed for 40 visits (G. Ex. 187; Tr. 3363). The evidence was similar as to Ora Kumler (Count Sixteen), who also died before trial (one visit mentioned in the notes, ten visits charged for) (G. Exs. 274, 424; Tr. 1790, 2356-107, 3361, 3367).

There was extensive evidence that petitioner made daily or nearly daily "rounds" of the hospital, usually in the early evening, visiting or purporting to visit patients (Tr. 503, 513-515, 685-686, 688, 692, 863-864, 931-932, 2374-2375, 2383-2385, 2392-2393, 2644, 2646, 2648-2651).[5] A nurse who worked the 3-11 p.m. shift and often accompanied petitioner on his

[5] Petitioner testified that he made the rounds twice daily, once in the morning and once at night (Tr. 2880).

rounds testified that petitioner would complete a round, during which he would see all of the approximately 30 patients in the 15-room facility, within 15 or 20 minutes. In the course of the tour, petitioner would speak to each patient who was awake, ask him how he was, and inquire if there was anything he needed. If a patient was asleep, petitioner would look at him, "check" him, and leave (Tr. 492-493, 503, 513-515). Another nurse, who worked the same shift three nights a week during the summer of 1967 (part of the pertinent period) and who accompanied petitioner on his rounds, testified that petitioner would omit the rounds some evenings. At the beginning of the summer, he made the rounds on two nights out of three or better, she said, but this average fell off towards the end of the summer. The witness, whose schedule included some week-end work, further testified that petitioner used to make his rounds on Saturdays but not on Sundays during the period of which she had knowledge (Tr. 930-932). A physician who resigned after working three weeks at the hospital, including some evening duty, testified that he had never seen petitioner make rounds (Tr. 1274-1275, 1342-1343).

A defense witness, a hospital administrator, testified that a hospital visit occurs when the doctor sees a patient in his room "with the chart"; that the length of the visit is "[n]ot always" important; that the visit "can be just to say 'hello, how are you feeling today' "; that it "can take five minutes if the patient is feeling well" or "half an hour if he is feel-

ing poorly" (Tr. 2627, 2629, 2639). There was no other testimony at trial as to what constitutes a hospital visit.

2. There is no merit to petitioner's contention that the court of appeals, in sustaining the sufficiency of the evidence to support his conviction, treated the case as though it were a civil one (Pet. 10-12). The test the court applied—that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it (Pet. App. A3)—is the correct standard applicable to criminal cases. *Glasser* v. *United States*, 315 U.S. 60, 80; cf. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 282; *Rutkin* v. *United States*, 343 U.S. 130, 135; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254; *Pierce* v. *United States*, 252 U.S. 239, 251-252; *Abrams* v. *United States*, 250 U.S. 616, 619; *Stilson* v. *United States*, 250 U.S. 583, 588.[6] The court was also correct in holding that the evidence, summarized above, was adequate under that standard.

3. Contrary to petitioner's assertion (Pet. 7-9), it was not improper for government counsel to argue to the jury that the encounters petitioner had with

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[6] The test does not, as petitioner suggests, overlook the criminal-law requirement of proof beyond a reasonable doubt. As phrased, the rule is but another way of stating that the evidence, viewed in the light most favorable to the government, must be such that the jury could properly have inferred from it guilt beyond a reasonable doubt. Cf. *Mortensen* v. *United States*, 322 U.S. 369, 374; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 n. 4.

his patients in his rounds in which he had merely said, "Hi, how are you?" were not "meaningful" visits of a sort for which he could properly bill the government, but had rather been fraudulent and "a sham" (Tr. 3381-3382, 3386). Neither the prosecutor nor the jury was bound by the testimony of the defense witness, referred to above, that a hospital visit can consist of a doctor's merely greeting a patient and asking how he is feeling. In the first place, the witness made the remark in the context of a larger statement in which he suggested that the *minimum* duration of a properly billable visit would be five minutes (Tr. 2639). More important, what a hospital visit consists of, as the trial court recognized, is not susceptible of precise definition. For this reason the court, without objection by defense counsel and indeed to counsel's expressed satisfaction (Tr. 3326, 3472-3473), deliberately refrained from instructing the jury as to what such a visit entails.[7] In these circumstances, the prosecutor properly noted in his summation that the phrase "hospital visit" is not a term of art, but one the jurors could properly interpret in the light of their knowledge, intelligence, and experience as laymen (Tr. 3380-3381). Cf. *Byrd* v. *United States*, 312 F. 2d 357, 358 (C.A. D.C.).

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[7] The instructions appear at Tr. 3531-3577.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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